STATE OF RHODE ISLAND
ENERGY FACILITY SITTING BOARD

IN RE: Sea 3 Providence, LLC	**:**	
d/b/a Sea 3 Providence	**:**	**Docket No. SB-2021-03**
(Rail Service Incorporation Project	**:**	
25 Fields Point Drive and Seaview Drive	**:**	
Providence, Rhode Island)	**:**	

MEMORANDUM OF LAW

Sea 3 Providence, LLC

By and Through Counsel:

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INTRODUCTION

The matter before the honorable members of the Energy Facility Siting Board ("EFSB") is a Petition for Declaratory Order filed by Sea 3 Providence, LLC ("Sea 3") on March 15, 2021 requesting that this Board declare that the proposed Rail Incorporation Project described by Sea 3 does not constitute an alteration of a major energy facility under R.I.Gen.Laws§42-98-3 and Section 1.3(a)(4) of the Board's Regulations. Sea 3 has previously submitted its Petition, Memorandum of Law in support of the Petition and a Site Report, with over 500 pages of exhibits and documentation in support of that Site Report, including, without limitation, a traffic study, Fire Safety Analysis, Process Basis of Design, site plans, storm water management information, soil management information and construction mitigation information. Following public comment and the intervention by the City of Providence, Department of Attorney General and Conservation Law Foundation (together the "Intervenors"), Sea 3 submitted an additional Memorandum of Law in response to their respective memoranda in support of their objections to the Petition on June 28, 2021. Sea 3 has also submitted a Power Point Presentation and a carbon emissions analysis prepared by Amy Austin of POWER Engineers in advance of the first hearing before the Board on July 1, 2021.

At the hearing on July 1, 2021, the Board, through the Chairman, requested that Sea 3 and the Intervenors submit further memoranda of law related to the Questions Presented listed below. In addition to the analysis contained in this Memorandum of Law submitted to the Board, Sea 3 incorporates by reference the arguments raised in its Petition and Memorandum of Law in Response to the Intervenors' Memoranda that have been previously submitted and speak to the Questions Presented addressed herein.

QUESTIONS PRESENTED

1. In interpreting the words "will result", what standard of certainty or probability should the Board use in interpreting the condition that the modification "will result" in a significant impact?
2. In interpreting the word "significant", what standard should the Board apply to determine whether an impact is significant?
3. To what extent do the other governmental entities who have oversight over the project and from whom Sea 3 would need to obtain approvals lack the expertise to appropriately and competently address the various impacts identified by the intervenors? Should the ability of these agencies to address environmental or other impacts influence the decision whether an impact is "significant" or not, for purposes of the Board finding jurisdiction?
4. Does the recently passed Climate Act apply to the interpretation of whether the Board has jurisdiction under the circumstances in this case? If so, how? If not, why not?

ANALYSIS

I. The statutory and regulatory definition of what constitutes an alteration of an existing major energy facility are clear and unambiguous and must be applied literally by this Honorable Board.

Our Supreme Court has been very clear that when a statutory or regulatory provision is clear and unambiguous, that provision must be interpreted and applied in accordance with the plain and ordinary meaning of its terms. *Caithness RICA Ltd. Partnership v. Malachowski*, 619 A.2d 833, 836 (R.I. 1993). A statute is only ambiguous if it is reasonably susceptible to more than one interpretation. If the words used in a statute "are unambiguous and convey a clear and sensible meaning, we look only to those words to ascertain the intent of the legislature." *Roadway Express, Inc. v. RI Commission for Human Rights*, 416 A.2d 673, 674 (R.I. 1980). When a statute or regulation is unambiguous, it must be interpreted and applied "literally" as there is "no room for statutory construction" and the statute is applied as written. *Labor Ready Northeast, Inc. v. McConaghy*, 849 A.2d 340, 345 (R.I. 2004); *McCain v. Town of North Providence*, 41 A.3d 239, 243 (R.I. 2012) *citing State v. Gordon*, 30 A.3d 636, 638 (R.I. 2011); *Tanner v. Town Council of East Greenwich*, 880 A.2d 784, 796 (R.I. 2005).

When a term is not defined in a statute or regulation, the Supreme Court has often applied the common meaning of the particular word or phrase at issue in a case. The Questions Presented by the Board center around two common words "will" and "significant." Both the statute and the Regulations provide that an "Alteration" means a "*significant* modification to a major energy facility, which, as determined by the board, *will* result in a *significant* impact on the environment, or the public health, safety and welfare. Conversion from one type of fuel to another shall not be considered an 'alteration'." R.I.Gen.Laws 42-98-3(b); Section 1.3(a)(4). Thus, if the Board finds that the Rail Incorporation Project is a significant modification that "will" result in a "significant" impact on the environment or public health, safety and welfare then the Board could deny the Petition and require Sea 3 to undergo the full application process. However, if the Board were to determine that the evidence before it "could" potentially result in a "significant" impact, or alternatively, that the evidence demonstrates that the project "will" result in "some" or "minimal" impact, then the Board lacks jurisdiction and is compelled by law to grant the Petition.

A. The term "will" is unambiguous and must be given its plain and ordinary meaning by this Board when scrutinizing the Petition.

As previously stated, when a word is not defined in statute or regulations, the courts have looked to the ordinary definition of the words as it is used in common society. The word "will" requires no statutory or regulatory definition to be understood. Webster's Dictionary states that the word "will" is a verb used to "express inevitability." Thus, it is used by its writer or speaker to assert that something is going to happen with certainty or that something "must" happen. Contrast the mandatory nature of an event implied by use of the word "will" with the more permissive or speculative nature of terms such as "may", "might", or "could." Webster defines these words as "auxiliary verbs" which speak to an event as "possible" or "conditional." When

looking to the *Black's Law Dictionary, Third Edition*, definition of the word "may" is used to convey "possibility" rather than certainty.

The Supreme Court has been clear that the best method to discern legislative intent is to read the language of the law, determine its plain meaning and apply the terms literally. It is only when ambiguity exists that a court would venture to discern what the legislature or administrative body intended through using a word or phrase. It is clear, that the Legislative use of the word "will" is not ambiguous in this context. When approving R.I.Gen.Laws §42-98-3(b), the General Assembly chose to limit the jurisdiction of the Board over significant modifications to existing majority facilities to only those that "will" result in significant impact to the environment and public health, safety and welfare. Had the General Assembly intended the Board's jurisdiction to be more broad, it would have utilized a verb or auxiliary verb such as "may", "might" or "could". For example, had the General Assembly intend to expand the jurisdiction of the Board to capture more modifications to existing energy facility sites, it would have stated something such as "Alteration means a significant modification to major energy facility, which, as determined by the Board *may* result in a significant impact…" Obvious, that was not the Legislature's intent.

The actions of the Legislature enjoy the presumption of validity. Our Superior Court has said that we presume that the members of the General Assembly act with purpose and knowledge of what it is they are doing when they pass the laws which govern our society. Throughout their previously submitted Memoranda, the Intervenors have directed the Board's attention to potential or possible impacts that might come to pass if the Project were to move forward. Putting aside the fact that these "potential" impacts raised by the Intervenors have been introduced through argument by counsel and not by factual evidence or data, they remain

"possible" impacts. Had the General Assembly intended for modifications of existing sites that "might" or "could" result in significant impacts to undergo the extensive and cumbersome application process required by the Board, then the Legislature would have drafted the statute to state that. *See Rhode Island American Federation of Teachers/Retired Local 8037 et al. v. Johnston School Committee et al.*, 212 A.3d 156-59 (R.I. 2018) (*quoting State v. Clark*, 974 A.2d 558, 571 (R.I 2009)) ("The Legislature is presumed to have intended each word or provision of a statute to express a significant meaning, and the Court will give effect to every word, clause or sentence, whenever possible."). However, that is not what the General Assembly has done in the context of §42-98-3(b). The General Assembly expressly requires that as a prerequisite of taking jurisdiction over a modification and substituting its permitting process in place of the other agencies involved, the Board is required to find that the modification "will" result in a significant impact as described in the statute. Thus the Board only has jurisdiction when the substantial evidence in the record shows, with reasonable certainty, that a modification will have a significant impact is on the environment, public health, safety and welfare.

The evidence before this Board clearly demonstrates that this project *will not* result in significant impact to the environment or public health, safety and welfare. Sea 3 is aware of the inherent risks in operating an LPG terminal and the fact that they must be controlled for and prevented every day. The merger of the adjacent lot, installation of new storage equipment and pipeline and connection to the rail line does not significantly increase these risks or significantly alter the nature of the risks. In fact, Sea 3 has presented evidence that the Rail Incorporation Project is a more environmentally friendly manner of operating an LPG the terminal. After completion, Sea 3 will meet growing demand for LPG while reducing the carbon emissions from

the site and advancing the process of converting the terminal from traditional LPG, to renewable LPG, in the coming years.

Sea 3 does not suggest that the word "will" means absolute certainty. Inherent in all major energy facilities are certain risks that when not controlled for can impact society. These incidents are the rare catastrophes which have occurred in our nation and around the word from time to time. Rather, in analyzing this Petition, the Board should exercise its discretion according to a standard of "reasonable certainty" in determining whether this expansion will result in significant impact. There is no evidence before the Board that outweighs the probative and competent information that has been presented by Sea 3 demonstrating there is no reasonable certainty of significant impact to the environment compared to the existing operation. Whether or not Sea 3 connects to rail, it will continue to operate the terminal. Regardless of the method of obtaining the LPG, it is demand that determines the amount of LPG which will be conveyed to and from the terminal each year. The data and information presented by Sea 3 shows, is that this Rail Incorporation Project *will not* have a significant impact. As will be discussed in Section I(B) below, the Rail Incorporation Project will not result in changes to the existing air quality permit issued by DEM nor change its current status as a non-contributor related to stormwater. There is no impact to surrounding vegetation, wildlife or marine life. The activities will remain far from the nearest residence and will not impair the recreational use or aesthetics of the surrounding area. Instead, upon completion of the Project, Sea 3 will be able to reduce carbon emissions from the site, meet the growing demand for LPG as an alternative to home heating oil, and ensure adequate supply of LPG as an emergency source of heat and power in times of need at a more predictable and affordable price to the consumer.

B. The term "significant" is unambiguous and must be given its plain and ordinary meaning by this Board when scrutinizing the Petition.

The term significant is equally as unambiguous and must be afforded its plain and ordinary meaning in this context as well. Our Supreme Court has previously held that similar statutory language using the word "significant" was unambiguous and thus needed to be applied literally in accordance with its plain and ordinary meaning. In *F. Ronci Co. Inc. v. Narragansett Bay Water Quality Management District Commission*, the Supreme Court stated that the phrase "significant quantities" was "sufficiently clear to business people of ordinary intelligence and susceptible of a common understanding." 561 A.2d 874, 877 (R.I. 1989). The Court applied a dictionary definition of significant as "having or likely to have influence or effect; deserving to be considered; important, weight, notable." Thus, applying a similar standard to determine whether this project will result in a significant impact, the Board must first look at the existing operation of the terminal and its impact on the surrounding community and then determine whether the proposed changes to the existing facility will result in an important or notable change. If the evidence demonstrates no impact, minor impact, or negligible impact or an improvement of the conditions, then the Board would be compelled to decline jurisdiction and Sea 3 would go through the normal permitting process required by the City of Providence, Department of Environmental Management, Coastal Resource Management Council and Federal Railroad Administration.

As Sea 3 has stated in its prior filings, this Rail Incorporation Project is not a significant modification to the existing facility and will not have a significant impact on the surrounding environment or community. There is no reliable objective data to suggest otherwise. First, the terminal has existed in its current location since 1975 and has previously seen as much as 100,000,000 of LPG pass through its operation under prior operators. Whether or not the Rail

Incorporation Project is completed, if Sea 3 continues to operate the terminal it will do so in the safest possible manner to meet market demand. If the Rail Incorporation Project does not move forward and demand grows as Sea 3 predicts, demand will be met through increased vessel shipments or through expansion of the its hours of operation of the truck racks. These are inferior alternatives in light of the state and city's energy goals. By introducing rail shipments into the terminal, across existing tracks over one half a mile far away from the general public, Sea 3 will reduce its carbon emissions from the site by fifty percent (50%) according to an analysis by Amy Austin of POWER Engineers. As discussed, when LPG is brought in via vessel it is stored in the existing 19,000,000 tank at -44° F. It is then rewarmed prior to being loaded into the trucks at the truck rack. It is the heating process which emits carbon emissions. The LPG arriving via rail does not need to be heated. Thus, every time Sea 3 can meet demand from the six bullets storing the LPG from the rail cars, the product is transferred without carbon emissions.

In addition to there being no long term significant impact as compared to the existing operations, there will not be significant impacts during construction. The safety protocols in place and equipment in place are not materially different from the existing operation. During construction, Sea 3's extremely competent team of professionals will develop the requisite stormwater, soil and dust mitigation plans which must be vetted an approved by the applicable state and city agencies as is required in all construction activities in the Port of Providence and other industrial sites with historic environmental contamination issues. All building permits and inspections will be done in accordance with applicable law.

Rail is the most common method of transporting LPG from the supplier to the terminal operator in the northeast. Sea 3's senior management team is well adept at operating a terminal featuring both vessel and rail transportation. This dual methods of obtaining LPG is exactly

what the Sea management has been doing at the sister company in Newington, NH. As presented in Sea‘s filings, and testified to by Jonathan F. Shute in his prefiled testimony, LPG is already transported via rail through the railroad line that runs through Providence and other parts of Rhode Island. In particular, the LPG which is shipped to the terminal in North Kingstown travels though the same area as at issue here . The inclusion of rail transportation does not bring a substance that is not otherwise routinely and commonly transported via rail through the city, state and nation already and thus cannot be said to be a significant modification of the site.

The additional equipment being included on the parcel which will be merged into the existing lot is not a significant modification either. Much of this equipment is similar to that already on site. The six bullet tanks which will store the LPG from the rail cargo represent a minor increase in storage capacity of just 2.8 percent. This can hardly be classified as a significant expansion of capacity of a facility that already has a 19,000,000 storage tank on site which has been there since operations commenced in 1975.

While there is no room for statutory construction and interpretation given the clear meaning of the word “significant”, the Board may consider it in the overall context of the Energy Facility Siting Act and its purpose. The Legislature intended to limit the jurisdiction of the Board over operational modifications to existing sites by only granting it authority over significant modification that will have significant impact on the environment and public health safety and welfare. If the Board were to go beyond the plain meaning of the terms of the statute and look to further elucidate the standard to be applied, the Board would look to R.I. General Laws §42-98-2 for context. The Declaration of Policy passed by the General Assembly states that it’s the policy of the state to “assure” that the facilities required to meet the energy needs of the state are planned for, considered and built in a timely and orderly fashion. The Declaration of Policy also

speaks to ensuring the timely construction of facilities needed to meet long term demand and that the products produced by the facilities be "at the least possible cost to the consumer" and "shall produce the fewest possible adverse effects on the quality of the state's environment…"

This Rail Incorporation Project is consistent with these policy goals. At the heart of the project is a desire to ensure that people who chose LPG as an alternative to home heating oil have the most affordable, reliable and efficient source LPG which Sea 3 can provide. Domestic LPG is more affordable for consumers because Sea 3 is not then beholden to the more volatile foreign markets to obtain the product. Domestic LPG is more reliable because it is less likely to be impacted by adverse weather conditions compared with vessel cargo. Furthermore, rail shipments allow for a reduction in the site-carbon footprint while maintaining the existing security and safety of the operation.

Finally, a hallmark of statutory construction is to avoid interpreting laws to reach absurd results. R.I.General Law§42-98-3(b) provides that the conversion from one source of fuel to another is not an alteration. Thus, under the expressed terms of the statue, Sea 3 could switch its operation from operating as an LPG terminal to operating as a home heating oil operation and not be considered an alteration. Such a modification would have a far more significant impact on the environment, public health and state/city environmental goals than what is proposed by Sea 3. At its most basic level, the Rail Incorporation project is nothing more than a lot merger, installation of additional equipment similar to what is already present, and connection to an existing rail spur to access LPG in the same fashion as its already going pm om the State elsewhere. It would be absurd to suggest that the Legislature intended, that, on the one hand, that modifying an existing operation in a manner that objectively reduces its impact on the environment and does not significantly impact the public health, safety and welfare compared to

its existing operation is a significant alteration but, on the other hand, a facility that completely changes it entire operation by bringing in a different and more harmful source of fuel would not be considered an alteration. Such a result indicates the intent and policy of the Act itself.

II. The Board's determination of whether the proposed Rail Incorporation Project has a significant impact on the environment, health, safety and welfare of the community must be reasonable and supported by substantial evidence in the record.

As in the case of most other administrative agency or board decisions, the decision of this Board must be supported by substantial evidence in the record in order to survive future judicial scrutiny. The Board's exercise of its discretion must be reasonable based upon the evidentiary record before it. In this context, substantial evidence has been defined by our Supreme Court to be an amount of legally competent evidence that is "more than a scintilla" but less than a preponderance of evidence in support of the conclusion. *Apostolou v. Genovesi*, 388 A.2d 821, 824-25 (R.I. 1978). Sea 3 has provided the Board with a detailed Site Report developed by a team of professionals and engineers to support its Petition and position that the Rail Incorporation Project will not have a significant impact on the environment or public health, safety and welfare. To this point, this evidence is the only legally competent evidence which has been submitted to the Board. Additionally, as requested by the Chairman, contemporaneous with the submission of this Memorandum of Law, Sea 3 is submitting prefiled testimony of the experts which prepared the Site Report. At the conclusion of the process, Sea 3 is confident that the weight of the evidence in the record will be more than sufficient to demonstrate that the project is not alteration requiring a full application.

The Intervenors have suggested that the need for the objectors to produce evidence of their own amounts to a shifting of the burden of persuasion away from the Petitioner and to the objectors. Neither Sea 3 nor the Board has shifted the burden of persuasion onto the Intervenors or the objectors. However, our Supreme Court has long held that in the absence of legally competent evidence to the contrary, no administrative board can simply cast aside and disregarding the weight of evidence, particularly evidence produced by experts or engineers, without equally or more competent evidence to the contrary. See *New Castle Realty Company vs. Dreczko,* 248 A3d 638, 645 (R.I. 2021) (quoting *Murphy vs. Zoning Board of Review of the Town of South Kingstown,* 959 A2d 535,653 (R.I. 2008) At this stage, there has been no evidence or testimony competent to refute that which has been provided by Sea 3. The Intervenors are not required to prove that the Rail Incorporation Project is alteration. However, if the Board is satisfied that based on the evidence presented in support of the Petition that Sea 3 has met its burden, then it is compelled to decline jurisdiction *unless* the Intervenors produce legally competent evidence which the Board finds more credible. Without substantial evidence to refute that which Sea 3 has and will continue to place in the record, the Board cannot rule in the Intervenors' favor. *Id*.

III. Sea 3 does not suggest that the role of other agencies in the approval process is determinative of the question of jurisdiction.

Since the introduction of its Petition, Sea 3's Rail Incorporation Project has been attacked and vilified through a misinformation campaign. However well intentioned the opponents to the project, or to LPG in general, may be, much of the criticism and opposition is based on misunderstandings and false information. One of those falsities is that Sea 3 is attempting to construct the Rail Incorporation Project without any oversight, public comment or approvals. First, Sea 3 filed this Petition for Declaratory Order willingly. It is not as though construction

began and the Board summoned Sea 3 to appear to explain why they had undertaken the project without filing of an application. Second, Sea 3 listed all the various approvals it will be required to apply for and successfully obtain if the Board does not take jurisdiction simply to demonstrate that if the Board declines jurisdiction the construction process is not unregulated. Sea 3 did not include this information in its Memoranda to suggest that because it is regulated primarily by the State Fire Marshall and Fire Safety Board or because its air quality permits are issued by DEM that the Board is precluded from jurisdiction. Sea 3 does not consider the involvement of those other agencies determinative of the threshold question of jurisdiction. Rather, that information has been included in Sea 3's submissions to dispel the misinformation that, if the Board declines jurisdiction, there is no other agency with the jurisdiction and expertise to ensure that the project is completed in a safe, compliant and lawful manner.

IV. Even if the Board retroactively applies the Act on Climate when deciding this Petition for Declaratory Order despite it not have been effective at the time of submission, the Act on Climate does not render this Rail Incorporation Project an alteration requiring a full application before the Board.

According to the emissions analysis submitted by Amy Austin from POWER Engineers, and the testimony filed in connection with this Petition, the Rail Incorporation Project will reduce the carbon emissions generated from the site by fifty (50%) percent at full implementation. Additionally, Sea 3 is not seeking to expand truck access to the Property and thus not seeking an expansion of the limits of its operation as allowed under its existing air quality permit. The Rail Incorporation Project does not change Sea 3's status as a noncontributor as it relates to storm water management and all construction will be done in accordance with properly approved stormwater, soil and dust management plans which will be completed at the appropriate time. Further, the intent of the Rail Incorporation Project is to ensure the cost effective and reliable availability of LPG which is a cleaner alternative to home heating oil for those lacking ready

access to natural has or those who cannot afford more costly options for switching to cleaner sources of energy. Therefore, while Sea 3 does not believe this Board can apply the goals of Act on Climate to this Petition, even if held to that standard the project is not an alteration by virtue of the passage of the Act itself.

While the evidence shows the Rail Incorporation Project is consistent with the Act in Climate, it is Sea 3's position that the Act on Climate should not be applied by the Board to either this Petition or a subsequent application if the Board finds jurisdiction. First, Sea 3 submitted its Petition on March 15, 2021 and the Act on Climate was not signed into law by Governor McKee until April 10, 2021. Retroactive application of a statute or regulation is disfavored and only authorized under limited circumstances which are not present here. The Act on Climate does not contain a specific and explicit retroactivity clause and therefore its application is only prospective, and the Board must view the Petition in light of the state of the law as it existed at the time of submission. *Gem Plumbing and Heating Co., Inc. v. Rossi*, 876 A.2d 796, 802 (R.I. 2005).

Second, even if inclined to apply the Act on Climate retroactively, the act itself is not ripe for application nor are the standard for its application, in this instance, yet articulated. The Act on Climate modifies existing law in Chapter 42-6.2 previously known as "Resilient Rhode Island Act of 2014 – Climate Change Coordinating Council." The Act on Climate modifies the composition of the Council, the powers of the Council, the percentage goals for reduction of greenhouse gases and carbon emissions and the contents of a "plan" to achieve these new goals. The plan referenced by the Act on Climate directs certain unspecified government agencies to promulgate regulations for achieving the goals. The plan must now contain a transition process away from certain sources of fuel to another. Under the Act on Climate, the Council and state are

to produce recommendations to achieve these goals and a timeline for the same. The Act on Climate requires certain agencies to develop new rules and regulations to be enforced and procedures for issuing notice of a violations for failure to comply.

As the Act on Climate just became law seven months ago, much of this work is yet to be done. It is unclear how it is to be applied to existing businesses like Sea 3. It is unclear what is required of Sea 3 to comply with the goals and provisions of the Act on Climate. Simply put, there has yet to be an intelligible standard articulated as to how the Act on Climate can, will or should be applied to Sea 3, LPG terminals or LPG customers. Without complete regulations and an intelligible standard to follow, the Act on Climate cannot yet be applied to Sea 3 or any other similarly situated business at this time by this Board.

CONCLUSION

For the reason herein, as well as those stated in the prior Memoranda submitted by Sea 3, the Board should grant Sea 3's Declaratory Petition.